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8 United States District Court
9 Eastern District of California
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12 Francisco Herra Lopez,

13 Plaintiff,

14 vs.

15 R. Franco, et al.,

16 Defendants.

No. Civ. S 05-0290 MCE PAN P

Findings and Recommendations

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18 July 13, 2005, the court dismissed plaintiff's complaint for
19 failure to state a claim and explained to plaintiff the
20 requirements of an amended complaint. Plaintiff has filed an
21 amended complaint.

22 I have reviewed plaintiff's amended complaint pursuant to 28
23 U.S.C. § 1915A and find it fails to state a claim for relief.

24 To state a claim under 42 U.S.C. § 1983, plaintiff must
25 allege an identified defendant deprived plaintiff of a right
26 secured to him by the Constitution or laws of the United States

1 while acting under color of state law. West v. Atkins, 487 U.S.
2 42, 48-49 (1988). To state a claim for discrimination in
3 violation of the Equal Protection Clause of the Fourteenth
4 Amendment, a plaintiff must allege identified defendants have
5 discriminated against him based upon his membership in a
6 protected class. Barren v. Harrington, 152 F.3d 1193, 1194
7 (1998).

8 Plaintiff challenges the decision to place him on lockdown
9 solely because of his race following gang-related violence.
10 Plaintiff's allegation defendants should have classified him as
11 "other" instead of "Hispanic" so plaintiff would not have been
12 placed on lockdown misses the mark. The Equal Protection Clause
13 is a command that government treat all similarly situated people
14 the same. City of Cleburne, Tex. v. Cleburne Living Center, 473
15 U.S. 432 (1985). It is not a command that government accurately
16 classify individuals to justify disparate treatment.

17 I find plaintiff fails to state a claim.

18 For these reasons, I hereby recommend this action be
19 dismissed for plaintiff's failure to state a claim. See Lopez v.
20 Smith, 203 F.3d 1122, 1128 (9th Cir. 2000) (indigent prisoner
21 proceeding without counsel must be given leave to file amended
22 complaint unless the court can rule out any possibility that the
23 plaintiff could state a claim).

24 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these
25 findings and recommendations are submitted to the United States
26 District Judge assigned to this case. Within 20 days after being

1 served with these findings and recommendations, plaintiff may
2 file written objections. The document should be captioned
3 "Objections to Magistrate Judge's Findings and Recommendations."
4 The district judge may accept, reject, or modify these findings
5 and recommendations in whole or in part.

6 Dated: November 29, 2005.

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8 /s/ Peter A. Nowinski
9 PETER A. NOWINSKI
10 Magistrate Judge
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